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ALEXANDER L. STEVAS,
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No. 83-144

IN THE SUPREME COURT
OF THE UNITED STATES

DOUGLAS VINZANT,
Petitioner

v.

ARNOLD KING,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

FRANCIS X. BELLOTTI
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QUESTIONS PRESENTED

I. Was the state of the law at the time of a prison disciplinary board hearing such that a prison superintendent charged with administrative review of the findings of said board should have known that his actions would deprive an inmate of a constitutional right so as to vitiate his qualified immunity?

II. Is there a duty on the part of a prison superintendent exercising administrative review of a prison disciplinary hearing to investigate the circumstances of the hearing to determine the process which was afforded the inmate?

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OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, Arnie King v. Douglas Vinzant, No. 82-1580 is not yet reported. (App. A) The order on the petition for rehearing in the same matter is not yet reported. (App. B)

The orders of the United States District Court for the District of Massachusetts are unreported. Arnold

King v. Joseph Higgins, Slip Op. C.A. No. 73-3337-T, May 7, 1982 and March 30, 1982. (App. C and D)

The Magistrates Findings and Recommendations on Magistrates Recommended Damage Award are unreported. Arnold King v. Joseph Higgins, Slip Op., C.A. No. 73-2227-T, (March 12, 1983). (App. E)

The Magistrates Report is unreported. Arnold King v. Joseph Higgins, Slip Op., C.A. No. 73-2227-T, (May 17, 1978) (App. F).

The opinion of the Court of Appeals for the First Circuit King v. Higgins, is reported at 495 F.2d 815 (1st Cir. 1974). (App. G)

The opinion of the United States District Court for the District of Massachusetts is reported at 370 F.Supp. 1023 (Mass. 1974). (App. H)

JURISDICTION

The decision below denying a timely petition for rehearing en banc was issued on April 27, 1983. The jurisdiction of this court is claimed under 28 U.S.C. §1254(1).

STATUTES INVOLVED

42 U.S.C. §1983. Civil Action for Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

STATEMENT OF THE CASE

Arnold King, on July 2, 1973 was an inmate in the farm section of M.C.I.-Concord. Following an incident

at his place of work, he was brought before a disciplinary board and charged with refusing to work, refusing a direct order, and inciting to riot. The plaintiff was not afforded prior notice of the hearing, nor advised of his right to counsel, to confront the complaining officer, or to present witnesses on his own behalf. At the time of the hearing, [Department of Corrections] Commissioner's Bulletin 72-1, which granted those procedural rights to prisoners appearing before a disciplinary board, was in effect. The prisoner was found guilty of all offenses and sentenced to 15 days isolation. He appealed the punishment to the Superintendent of M.C.I.-Concord, the Petitioner herein, characterizing the disciplinary proceeding as a "Kangaroo Court". Vinzant, the

Superintendent, after examining the reports of the disciplinary board, which mentioned nothing in regard to the procedure afforded the inmate, denied the appeal.

King brought the instant civil rights action against Douglas Vinzant, former Superintendent, M.C.I.-Concord, and Joseph Higgins, former Acting Commissioner of Corrections for injunctive, declaratory and monetary relief under the provisions of 42 U.S.C. §1983, alleging that his right to due process of law was violated in the course of prison disciplinary and reclassification hearings, wherein he was not afforded prior notice of the proceedings, nor advised of his rights to counsel, to confront the complaining officer, and to call witnesses on his own behalf. After hearing by a

magistrate, the United States District Court, in King v. Higgins, 370 F.Supp. 1023 (1974) (App. H) ruled that the plaintiff had been deprived of due process of law in both the disciplinary and reclassification proceedings, and ordered that the records be expunged of the results of both hearings. The matter was then referred to a magistrate for consideration of the plaintiff's claims for compensatory and punitive damages. The United States Court of Appeals for the First Circuit affirmed, on the narrow ground that the disciplinary hearing might have been a factor in the reclassification decision. King v. Higgins, 495 F.2d 815 (1974). (App. G) A Magistrate's Report was issued on May 17, 1978 (App. F), which absolved the defendant Higgins of any liability, and recommended that

defendant Vinzant be held liable in the amount of $390.00 ($15.00 for 15 days' loss of wages at $1.00 per day and $25.00 per day for the 15 days of isolation) as compensation for pain suffering allegedly sustained. The case was remanded to the magistrate for reconsideration in light of Carey v. Piphus, 435 U.S. 247 (1978). No action was taken, and the matter was referred to a second magistrate for a determination of the factual basis of the first magistrate's recommended damages award. The second magistrate upheld the recommended damages in the Findings and Recommendations on Magistrate's Recommended Damage Award, issued March 12, 1982, (App. E) concluding that the plaintiff would not have been placed in isolation had he been afforded due process protections,

and that he had shown actual injury resulting from the deprivation of his constitutional rights. The District Court approved the magistrate's recommendation on March 30, 1982, and ordered that judgment be entered agains he defendant Vinzant for $390.00 in compensatory damages and in favor of the defendant Higgins. After reviewing the defendant's objections to the magistrate's findings, the District Court directed that the order remain in effect. (App. C and D) The First Circuit Court of Appeals affirmed the decision of the District Court. (App. A) Petition for rehearing en banc was denied. (App. B)

REASONS FOR GRANTING THE WRIT

I. The decision below constitutes an unwarranted expansion of the duties

of an official exercising administrative review of a prison disciplinary hearing which expansion is not constitutionally mandated.

II. The decision below is not constitutionally compelled and conflicts with the tenor of decisions of this and other lower federal courts concerning the availability of qualified immunity for prison officials and the application of respondent superior in civil rights actions.

ARGUMENT

I. THE DUTIES OF AN OFFICIAL EXERCISING ADMINISTRATIVE REVIEW SHOULD NOT BE EXPANDED TO INCLUDE FACTFINDING INVESTIGATION.

A summary of the rationale in the court below is that the petitioner as the administrative reviewing authority is under an obligation to investigate

the procedural amenities which were afforded an inmate at a disciplinary hearing in a prison setting. This position expands the duty of an authority who is in essence a quasi-administrative law judge. It imposes upon the quasi-judicial functionary the duty to investigate whether each and every inmate who is involved in a disciplinary infraction has been afforded the procedures which are to be afforded inmates at such hearings.

This is in direct conflict with the holdings of the Fourth Circuit in the case of Ward v. Johnson, 667 F.2d 1126 (4th Cir. 1981) where the Court held that the reviewing authority could not be held liable in a 42 U.S.C. §1983 action because the reviewing authority played no actual part in the denial of

the privileges which were to be afforded inmates at that time. Ward, supra at 1131.

As the Court of Appeals aptly noted in the instant matter this is not a case where the plaintiff had erred a failure to exercise sufficient supervision and offer adequate training to inferiors. See, for example, Hayes v. Thompson, 637 F.2d 483 (7th Cir. 1980).

Once regulations are in effect, a prison official should be able to assume that the regulations are being followed by line officers. Otherwise, the burden of reviewing disciplinary reports which falls upon prison officials is odious. It is highly likely that the ultimate impact of the holding of the Court of Appeals will be to discourage correction officials in the First Circuit, and elsewhere, from promulgating any

regulations beyond those constitutionally required, and to encourage them to limit as far as possible the review functions of supervisory officials, lest an error in judgment or failure to make what a federal court would regard as a complete enough investigation subject them to liability for damages for violation of a less than clearly defined constitutional right.

II. A PRISON OFFICIAL WHO IS NOT ACTUALLY INVOLVED IN AN ALLEGED DEPRIVATION OF CONSTITUTIONAL RIGHTS AND HAS NO ACTUAL KNOWLEDGE OF THE VIOLATION SHOULD NOT BE HELD LIABLE FOR MONETARY DAMAGES.

This court has consistently held that there must be a causal connection between a defendant in a civil rights action and the harm claimed by the plaintiff. Rizzo v. Goode, 423 U.S. 362, 370 (1976), Monell v. New York City

Dept. of Social Services, 436 U.S. 658, 692 (1978). Here the causal connection between the failure to provide procedural amenities and the actions of the reviewing authority are tenuous at best.

In addition, the reasoning used by this Court in rejecting defendant Vinzant's good faith immunity defense was that he had a duty to fully investigate the plaintiff's allegation in his appeal from the disciplinary board finding that "I thought this had ended in March the last time I was in Kangaroo Court but I can see that it has not", and that his failure to do more than look beyond the reports he got from the members of the disciplinary board (which did not indicate that all of the applicable regulations had been followed) constituted a "reckless disregard" of the plaintiff's rights.

King v. Higgins, No. 82-1580, (1st Cir. March 9, 1983). (App. A) Thus, even though the "precise bounds" of constitutional due process required for disciplinary hearings were not clear at the time of Vinzant's review, Id., his failure to correct possible disregard of regulations by his subordinates constituted a violation of state law, and therefore made his conduct unlawful for immunity purposes.

The implication of this rationale is that a supervisory correction official who negligently performs an administrative review function cannot assert good faith immunity for a constitutional violation even if the constitutional rights in question were not firmly established, where relevant department regulations were violated by someone else in the proceeding being

reviewed. It is suggested that this conclusion is inconsistent with the decisions of this court in Harlow v. Fitzgerald, ____ U.S. ____, 102 S.Ct. 272 (1982), Butz v. Economu, 438 U.S. 478 (1978), and Scheuer v. Rhodes, 416 U.S. 232 (1974) and that those cases require a finding that an official entitled to immunity has violated a clearly established constitutional right or federal statute by his own conduct before he can be found liable for damages for that violation.

The applicable standard was enunciated in Harlow as follows:

"We therefore hold that government officals performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 102 S.Ct. at 2738.

That case, as well as Butz and Scheuer, discussed only violations of federal,

constitutional law in the context of the immunity defense. An extension of this principle to state regulations is not mandated or even suggested by these cases, or the policies underlying the availability of the good faith immunity defense for discretionary conduct of state officials. See, e.g., Harlow, supra at 2739, fn. 32, in which the court mentions that it did not need to decide whether the state of the law should be "'evaluated by reference to the opinions of this Court, of the Courts of Appeals, or of the local District Court.'"

Furthermore, an analysis that depends on a prison superintendent's recklessness in not adequately performing his duty of review (which is not defined in the regulations at issue here) injects the subjective element of

the good faith defense back into the evaluation of the claim, a result contrary to the holding of this court in Harlow, supra, eliminating that portion of the test.

CONCLUSION

For the reasons stated above, the writ of certiorari should issue to review the decision of the Court of Appeals for the First Circuit.

Respectfully submitted,

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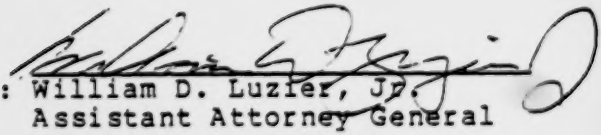

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1580

ARNIE KING,

Plaintiff, Appellee,

v.

JOSEPH HIGGINS,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. Joseph L. Tauro,
U.S. District Judge]

Before

Coffin, Chief Judge,
Bownes, Circuit Judge,
and Pettine,* Senior District Judge.

March 9, 1983

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* Of the District of Rhode Island,
sitting by designation.

COFFIN, Chief Judge. This is an appeal from an award of $390 in compensatory damages to plaintiff-appellee Arnold King for deprivation of his due process rights at a prison disciplinary hearing. At the time of the proceedings, on July 2, 1973, plaintiff was an inmate at the farm section of M.C.I., Concord. Defendant Douglas Vinzant was the Superintendent at that prison. His codefendant in the proceedings below was Joseph Higgins, Acting Commissioner of Corrections.

Following an incident at his place of work, plaintiff was brought before a disciplinary board and charged with refusing to work, refusing a direct order and inciting to riot. He was not afforded prior notice of the hearing, nor advised of his right to seek the

advice of counsel, to confront the complaining officer and to present witnesses on his own behalf. He was found guilty of all offenses and sentenced to 15 days isolation. He appealed to defendant Vinzant, characterizing the disciplinary proceeding as a "Kangaroo Court". Defendant Vinzant denied the appeal.

After the disciplinary hearing, prison officials held a reclassification hearing. The reclassification board recommended that because of his frequent disciplinary infractions, plaintiff be transferred to a more secure institution, M.C.I., Walpole.

Plaintiff brought suit under 42 U.S.C. §1983, alleging deprivation of his right to due process of law and

effective assistance of counsel.[1] After a hearing by a magistrate, the district court, in King v. Higgins, 370 F. Supp. 1023 (D. Mass. 1974), ruled that the procedures employed at his disciplinary hearing deprived plaintiff of due process of law and that the deprivation also tainted his reclassification hearing. The court ordered that the findings of the disciplinary and reclassification boards be expunged from his record and new

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1/ Plaintiff claimed that defendant Vinzant had prevented counsel from speaking with plaintiff for a number of days when he was confined in isolation. The district court noted that the magistrate had made no findings regarding that claim and, in view of its order invalidating the proceedings on other grounds, found it unnecessary to do so itself. The court found it sufficient to note that prisoners retain their constitutional right to effective assistance of counsel and the corollary right to free and private communication with counsel. Plaintiff's ineffective assistance of counsel claim is not at issue before us.

hearings be held, and referred to a magistrate plaintiff's claims for compensatory and punitive damages against defendants Vinzant and Higgins. We affirmed the invalidation of the disciplinary and reclassification hearings, but found the issue of damages not yet appealable. King v. Higgins, 495 F.2d 815 (1st Cir. 1974). In a de novo hearing on March 8, 1974, plaintiff was found not guilty of inciting to riot and guilty of the other two offenses. He was removed from the farm at Concord, but no isolation time was imposed.

On May 17, 1978, the Magistrate recommended that plaintiff be awarded $390 in damages against defendant Vinzant resulting from the lack of protections afforded plaintiff at his disciplinary hearing -- $375 for pain and suffering during 15 days in

isolation and $15 for loss of wages. The Magistrate recommended no damages against defendant Higgins, because plaintiff had produced insufficient evidence that Higgins knew or should have known that departmental procedure was not being followed. He found neither defendant liable for damages flowing from the reclassification hearing, since the law regarding a prisoner's rights at such a hearing was unclear at the time of the incident.

On September 20, 1978, the district court remanded the report to the Magistrate, in light of Carey v. Piphus, 435 U.S. 247 (1978), for findings of fact on which his recommended award was based. No action was taken until March 12, 1982, when a second magistrate concluded that there was a factual basis for the imposition of the $390 damage

award. The district court approved the Magistrate's findings and ordered that judgment be entered in favor of plaintiff. From that opinion, defendant Vinzant appeals.

Good Faith Immunity

Defendant urges that he should be immune from damages under 42 U.S.C. §1983 both because the state of the law regarding a prisoner's rights at a disciplinary hearing was unclear at the time of plaintiff's appeal and because he neither knew nor should have known that his conduct violated those rights. We agree with defendant that he is entitled to a qualified immunity from damages under Section 1983. Procunier v. Navarette, 434 U.S. 555 (1978). Thus, he is liable for damages only if he knew or should have known that his action would violate plaintiff's

constitutional rights. Id. at 562; Wood v. Strickland, 420 U.S. 308, 322 (1975). We disagree, however, with defendant's contention that he should not reasonably have known that plaintiff was entitled to certain minimum procedural safeguards at his disciplinary hearing or that plaintiff had not received those safeguards.

It has long been settled that "whenever substantial individual interests of prisoners are at stake, 'some assurances of elemental fairness are essential.'" Palmigiano v. Baxter, 487 F.2d 1280, 1283 (1st Cir. 1973) (quoting Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970)). As defendant points out, at the time of plaintiff's disciplinary hearing the precise bounds of those required assurances were not clear. In Palmigiano, supra, decided

after plaintiff's hearing and appeal, we set out certain due process standards for a hearing that may result in a marked change in a prisoner's status. Then, in Wolff v. McDonnell, 418 U.S. 539 (1974), the Supreme Court held that due process required that a prisoner be given advance written notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the disciplinary action taken. Because the hearing in this case antedated both Wolff and Palmigiano, defendant urges that he should not be held responsible for having deprived plaintiff of those rights. We disagree.

In its opinion invalidating plaintiff's hearing, the district court noted the requirements newly enunciated in Palmigiano, but determined that it

need not rely on them because "measured against even the most basic standards of due process and fundamental fairness, the disciplinary procedure afforded plaintiff fails to pass constitutional muster." King v. Higgins, supra, 370 F. Supp. at 1028. Plaintiff risked and was punished by a substantial deprivation of liberty. As the district court recognized, it had long been clear that at a hearing which could result in such punishment plaintiff was entitled at least to notice and the opportunity to present evidence in his own behalf. Id. (citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970)).[2/] We agree with the

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2/ The district court also listed as fundamental the right to confront adverse witnesses. 370 F.Supp at 1028. The Supreme Court, however, would leave the availability of that right to the sound discretion of the officials of state prisons. Wolff v. McDonnell, supra, 418 U.S. at 569.

district court that those safeguards should be considered part of the "assurances of elemental fairness" to which a prisoner is entitled and that needed no specific judicial articulation.

Our decision is bolstered by the presence of departmental regulations guaranteeing the rights of which plaintiff was deprived. The district court held that defendant's failure to adhere to those guidelines itself constituted a violation of due process. In light of recent Supreme Court guidance, see United States v. Caceres, 440 U.S. 741 (1979), we have now retreated from our earlier position that a failure to adhere to administrative regulations promulgated to protect constitutional rights is itself a violation of due process, see United States v. Irvine, Slip op. No. 82-1386,

1st Cir., Jan. 28, 1983, although we note that the presence of those regulations may signal a state created liberty interest entitled to federal due process protection, see Hewitt v. Helms, U.S. , 51 U.S.L.W. 4124, 4126 (Feb. 22, 1983) (No. 81-638). Even if, standing alone, a violation of the regulations does not provide a basis for a due process claim, however, the presence of those regulations certainly rebuts defendant's "good faith" defense. Even if he did not know that the Constitution required that plaintiff be given advance notice and an opportunity to present evidence, he knew or should have know that his own departmental regulations required those protections. Defendant should not be able to escape liability for a constitutional violation simply because

he thought the rights being denied were protected only by his own departmental regulations (which have the effect of state law). See Niles v. Boston Rent Control Administrator, 6 Mass. App. Ct. 135, 150 (1978) ("Rules which have been promulgated pursuant to a legislative grant of power have the force of law and are binding on the agency which issued them.").

We are similarly unpersuaded by defendant's argument that he neither knew nor should have known that plaintiff had been denied his constitutional rights. Defendant apparently does not dispute the fact that as the official designated to hear prisoners' appeals, he should be liable in damages for his inaction in curing deficiencies in the disciplinary proceedings of which he was aware. See

Rizzo v. Goode, 423 U.S. 370, 371 376 (1976) (for liability under Section 1983, there must be a sufficient link between the constitutional violations and any action or inaction on the defendant's part). He suggests, instead, that based on the information before him, a general complaint from plaintiff that the proceeding was a "Kangaroo Court" and reports of the disciplinary board members that indicated no deprivation of constitutional rights, he had no reason to know that plaintiff's rights had been violated.

Defendant confuses a lack of knowledge of the failure of other officials to ensure plaintiff's constitutional rights with a lack of duty on his part to assure that the proceedings below were constitutionally

sound. As the official designated to hear prisoners' appeals, he had a duty to conduct at least a minimal investigation to determine whether there was any merit to plaintiff's appeal. See Dimarzo v. Cahill, 575 F.2d 15, 17-18 and n.3 (1st Cir. 1978) ("[f]ailure to act where there is a duty to act can give rise to an actionable claim under section 1983"). Defendant insists that he fulfilled that duty by asking for reports from the members of the disciplinary board. Those reports, however, were sufficient at least to put him on notice of the constitutional violations.[3/] Whether or not,

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3/ Defendant is thus distinguishable from the warden in Hayes v. Thompson, 637 F.2d 483 (7th Cir. 1980), who, despite his supervisory responsibilities, was found not to be responsible for the procedures employed

(footnote continued)

based on the appeal and the reports of the disciplinary board members, defendant knew or should have known that plaintiff had been deprived of his rights, he knew or should have known enough to have investigated further. The reports of the board members were conspicuous in their silence regarding plaintiff's prior notice of the proceeding and his opportunity to confront the complaining officer and present witnesses on his own behalf. In addition, one of the reports indicated

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(footnote continued)

by the Institutional Adjustment Committee. The warden had issued regulations regarding the conduct of the disciplinary proceedings, but he had no specific responsibility to review the findings and procedures of the Committee. The court declined to reject as "clearly erroneous" the district court's conclusion that the warden had fulfilled his supervisory responsibilities.

that the board's decision was based in part on a private conversation with the complaining officer. We agree with the Magistrate that in light of the information before him, defendant's failure to investigate further to determine whether plaintiff had received his constitutional rights constituted reckless disregard of plaintiff's rights and leaves him unable to assert a good faith defense to his liability for damages under 42 U.S.C. §1983.

Proof Of Actual Injury

Defendant argues that compensatory damages should be denied because there was no proof that plaintiff was actually injured by the due process violations. Carey v. Piphus, 435 U.S. 247 (1978). He insists that since plaintiff was found guilty at a de novo hearing of two of the three offenses of which he was

convicted at the first hearing, the failure to afford procedural due process cannot properly be viewed as the cause of the sanctions, specifically the sanction of isolation, imposed at the first hearing.

Defendant's argument is without merit. On the basis of plaintiff's first, improper disciplinary hearing, he was found guilty of refusing to obey a direct order, refusing to work and inciting to riot. He was sentenced to and served 15 days in solitary confinement. In the de novo hearing ordered by the district court, plaintiff was convicted only of the first two offenses but was found not guilty of the most serious offense (inciting to riot) and given no time in isolation. His 15 days in isolation can therefore reasonably be attributed to the

deprivation of due process at his first hearing and damages based on his pain and suffering and loss of wages during those 15 days are proper.

The judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 82-1580

ARNIE KING,
Plaintiff, Appellee,

v.

JOSEPH HIGGINS,
Defendant, Appellant.

DOUGLAS VINZANT,
Defendant, Appellant.

BEFORE
Campbell, Chief, Judge,
Coffin, Bownes and Breyer, Circuit Judges
and Pettine,* Senior District Judge

ORDER OF THE COURT

Entered: April 27, 1983

Defendant suggests that our analysis failed to follow the guidance of the Supreme Court in Harlow v. Fitzgerald, 50 U.S.L.W. (June 24, 1982), that the availability of a "good faith" immunity defense be determined by an objective standard -- whether the law was so clearly established at the time the violation occurred that an official knew or reasonably should have known that the action he took would violate the

constitutional rights of the plaintiff. As we noted in the opinion, the federal right which plaintiff was denied was clearly established at the time of the violation. The presence of departmental regulations setting out the requirements which we found to be constitutionally required simply reinforced our judgment that defendant could claim no relevant legal standard. See id. at 4820; see also id. at 4821 ("The standard adopted by the court] would not allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could ot 'reasonably have been expected' to know what he actually did know.") (Brennan, Marshall and Blackmun, J.J., concurring in the opinion of the Court).

The petition for rehearing is denied.

The judges of the panel having voted to deny the petition for rehearing and the judges of the Court who are in regular active service having voted rehearing en banc,

It is further ordered that said application for hearing en banc is hereby denied.

By the Court:

Clerk.

*Of the District of Rhode Island, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ARNOLD L. KING, Plaintiff,	)	
V.	)	C.A. 73-2227-T
JOSEPH HIGGINS and DOUGLAS VINZANT, Defendants.	)	

ORDER

TAURO, D.J. March 30, 1982

Magistrate Alexander's Findings and Recommendations on the Magistrate's Recommended Damage Award are approved without opposition. Thus it is ORDERED that judgment shall enter, and judgment is hereby entered, in favor of the plaintiff in his claim for monetary relief against defendant Douglas Vinzant. It is ORDERED that judgment

shall enter, and judgment is hereby entered, in favor of defendant Joseph Higgins, on plaintiff's claim for monetary relief against him.

The court having granted plaintiff's request for injunctive relif previously, it is ORDERED that judgment shall enter, and judgment is hereby entered, in favor of the plaintiff in his claim for injunctive relief.

It is so ORDERED.

_____

United States District Judge

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARNOLD L. KING, Plaintiff,	)	
V.	)	C.A. 73-2227-T
JOSEPH HIGGINS, DOUGLAS VINZANT, Defendant.	)	

ORDER

TAURO, D.J. May 7, 1982

The court has reviewed the defendants' objections to the Magistrate's Findings and Recommendations of March 12, 1982, and finds them unpersuasive. Accordingly the court's order of March 30, 1982 shall remain in effect.

It is so ORDERED.

United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ARNOLD L. KING,
Plaintiff

CIVIL ACTION
No. 73-2227-T

v.

JOSEPH HIGGINS and
DOUGLAS VINZANT,
Defendants

FINDINGS AND RECOMMENDATIONS
on
MAGISTRATE'S RECOMMENDED DAMAGE AWARD

March 12, 1982

ALEXANDER, M.

This case was originally remanded on September 20, 1978 to a Magistrate for findings of fact on which his recommended damages award was based in light of Carey v. Piphus, 435 U.S. 247 (1978). No action having been taken, the matter was referred to this Magistrate for a determination of the

factual basis of the former Magistrate's recommended damages award.

This court has read the report of the Magistrate and can find no facts explicitly articulated therein to support an award of compensatory damages, particularly in light of Carey v. Piphus, 435 U.S. 247 (1978).

However, a review of memoranda submitted herein and a court review of the pleadings and records filed persuades this Court that a factual basis for the imposition of compensatory damages pursuant to Carey v. Piphus, 435 U.S. 247 (1978) exists.

SUPPLEMENTAL FINDINGS OF FACTS

1. That on or about July 2, 1973, the plaintiff was taken before a disciplinary board for a hearing which did not afford him his constitutional due process rights. King v. Higgins, 370 F.Supp. 1023 (1974).

2. That as a result of said hearing, plaintiff was found guilty of three disciplinary offenses, i.e.,

a. inciting to riot;

b. refusing to obey a direct order; and

c. refusing to work.

3. The sanction imposed was fifteen days in isolation.

4. That on or about March 8, 1974, the plaintiff was afforded a de novo hearing on the same offenses.

5. The disciplinary board found the plaintiff not guilty of the most serious offense, i.e., inciting to riot, but guilty of refusing to obey a direct order and guilty of refusing to work.

6. As a result of the de novo hearing findings, the plaintiff was to be removed from the farm at Concord. Moreover, the Board recommended reclassification.

7. No isolation time was imposed.

8. Plaintiff's Pre-Trial Memorandum filed February 4, 1977 not only shows that pain and suffering on the part of the plaintiff may be proven but that witnesses are available to so prove. (Plaintiff's Pre-Trial Memorandum, pp. 13, 16).

9. Defendant's Pre-Trial Memorandum filed February 4, 1977 shows that the kind of damages due to plaintiff is a triable issue. (Defendant's Pre-Trial Memorandum, pp. 8, 9).

10. An offer of proof was made respecting the effects of confinement. (Plaintiff's Memorandum on Damages, January 3, 1980, pp. 3, 4).

CONCLUSIONS OF LAW

In Carey v. Piphus, supra, the Court made it clear that when a plaintiff can prove actual damages resulting from the

deprivation of procedural due process, plaintiff may recover compensatory damages in addition to nominal damages.

In applying the principles enunciated in Carey to the case at bar, the Court first looks to whether the plaintiff would have been placed in isolation if a proper hearing had been held. If so, plaintiff would be precluded from recovering damages.

It is clear that the plaintiff is not precluded from recovering damages where the result of the proper hearing (the de novo hearing of March 8, 1974) was that he was found not guilty of inciting to riot and guilty of the other two offenses, with no isolation time imposed, as contrasted to the improper hearing (July 2, 1973) where he was found guilty of all three offenses, with fifteen days isolation imposed.

The two-prong test of Carey v. Piphus requires that the Court next ask whether there is proof of actual injury. While the record is not illuminating, and it is difficult, if not impossible, to discern the former Magistrate's mind, the assertions of plaintiff's counsel (Memorandum on Damages Pact -- Finding, January 3, 1980, p.3) as to what and, more specifically, who would be utilized to prove damages, coupled with pre-trial memoranda of both counsel, gives the Court its basis for finding facts supporting actual injury. More compelling, however, is the offer of proof as to the effects of plaintiff King's confinement (Memorandum on Damages, January 3, 1980, p.4). None of these assertions have been disputed by the defendant. Accordingly, this Court

finds there was a factual basis to award compensatory damages. Both defendant Vinzant and plaintiff stipulate that if compensatory damages are awarded, the amount arrived at by the former Magistrate should be deemed appropriate.[1/] It is, therefore, recommended that the defendant Vinzant be held liable to plaintiff for damages in the amount of $375.00 for pain and suffering and $15.00 for loss of wages.

UNITED STATE MAGISTRATE

1/ See Plaintiff's Memorandum in Response, Docket No. 36; Defendant's Supplemental Memorandum Docket No. 35.

APPENDIX F

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.
73-2227-T

ARNOLD KING,
Plaintiff,

v.

JOSEPH HIGGINS,
DOUGLAS VINZANT,
Defendants.

MAGISTRATE'S REPORT[1]

May 17, 1978

PIERCE, M.

This action for equitable and monetary relief was commenced pursuant to 42 U.S.C. §1983 (Civil Rights Act) by

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1/ The Magistrate sat as a Special Master in this matter under the provisions of Rule 53, F.R.Civ.P., and Local Rule 6E, Magistrates Rules.

an inmate, Arnold King, against two corrections officials of the Commonwealth of Massachusetts, Douglas Vinzant (Superintendent, MCI Concord) and Joseph Higgins (Acting Commissioner of Corrections). In this action, plaintiff alleges three constitutional deprivations:

1. That his right to due process was violated in the disciplinary hearing;

2. That his right to due process was violated in the classification hearing; and

3. That he was denied the assistance of counsel. As a consequence of the disciplinary hearing, plaintiff was placed in isolation; and, as a consequence of the classification proceeding, plaintiff was transferred to a more secure institution -- MCI Walpole.

This action has an extensive judicial history. In King v. Higgins, 370 F.Supp. 1023, 1026 (D. Mass. 1974), the District Court held that the procedures followed by defendants in the disciplinary hearing fell short of basic standards of due process and fundamental fairness. Similarly, the court held that defendants failed to accord plaintiff, in the reclassification hearing, the minimal due process requirements to which he was entitled. id 1029. The court then ordered the expungment of the decisions of these boards from plaintiff's record.

Subsequently, defendants appealed the District Court ruling invalidating the classification hearing. The Circuit Court affirmed the District Court decision in King v. Higgins, 495 F.2d 815, 816 (1974) but on narrower

grounds. It held that the unlawful disciplinary hearing "was to some uncertain extent taken into account in appellee's reclassification."

Thereafter the matter was referred to me for the purpose of making additional findings of fact and recommendations of law regarding plaintiff's claim for compensatory and punitive damages. Having reviewed all the exhibits and affidavits and otherwise taken into consideration all of the evidence and arguments of counsel, I hereby make the following additional findings of fact and recommendations of law:

FINDINGS OF FACT[2/]

1. That on July 2, 1973

2/ I have not reiterated into the findings of the District Court in Higgins. The District Court's findings are set forth in Higgins at 1025-1026.

plaintiff was an inmate in the farm section of MCI Concord. That as a result of an incident which occurred on that date at MCI Concord involving the plaintiff, the plaintiff was brought before a disciplinary board for hearing. That plaintiff was found guilty of refusing to work, refusing a direct order and inciting a riot. Higgins, supra at 1025;

2. That plaintiff appealed this finding to defendant Vinzant. Higgins at 1025-1026. That in this appeal, plaintiff characterized the disciplinary hearing as a "kangaroo court." Plaintiff's Exhibit 2;

3. That at the disciplinary hearing plaintiff was not afforded the following rights:

A. Prior notice of the hearing;

B. Advised of his right to counsel;

C. Advised of his right to confront the complaining officer, or

D. Present witnesses on his own behalf. Higgins at 1025;

4. That the Department of Corrections then had in effect regulations granting inmates the above-described rights;

5. That defendant Vinzant was aware of the department regulations granting inmates such rights. Defendant's Pre-Trial Memorandum, p. 3;

6. That defendant Vinzant denied plaintiff's appeal from the decision of the disciplinary board. Higgins at 1026;

7. That even though plaintiff characterized the disciplinary proceeding as a "kangaroo court" in his appeal, defendant Vinzant failed to inquire as to whether plaintiff was afforded his constitutional and regulatory rights during the disciplinary proceeding;

8. That defendant Vinzant relied upon the reports of the disciplinary board in making his decision upon plaintiff's appeal.

9. That the report of the disciplinary board did not indicate whether plaintiff had been afforded his constitutional and regulatory rights;

10. That the failure to follow established departmental regulations was a violation of plaintiff's due process. Higgins at 1028;

11. That the right to prior written notice, the presentation of witnesses and the confrontation of adverse witnesses were clearly established due process rights in the in the disciplinary context at the time of this incident. Palmigiano v. Baxter, 487 F.2d 1280, 1283 n.7 (1st Cir. 1973); Higgins, supra 370 F.Supp. at 1027-1028;

12. That the action of defendant Vinzant, under the circumstances of this case, affirming the disciplinary board's decision constituted a reckless disregard of the clearly established constitutional and regulatory rights of the plaintiff. Wood v. Strickland, 420 U.S. 322 (1975); Downs v. Sawtelle, No. 77-1260, Slip Op. pp. 17, 22 (March 30, 1978).

13. That plaintiff failed to present any evidence which establishes that defendant Higgins knew or should have known about the violations which occurred during plaintiff's disciplinary hearing. Cf. Dimarzo v. Cahill, No. 77-1416, Slip Op. p. 5-6 (1st Cir. May 2, 1978);

14. That on July 3, 1973 a reclassification hearing was held. Following the hearing it was recommended that plaintiff be transferred to MCI Walpole. On July 25, 1973 defendant Higgins approved the recommendation. Higgins at 1026;

15. That the law regarding an inmate's due process rights in the reclassification hearing context was unsettled at the time of this incident. Gomes v. Travisono, 353

F.Supp. 457, 467 (D. R.I. 1973); Gray v. Creamer, 465 F.2d 179, 187 (3rd Cir. 1972);

16. That given the uncertain state of the law in the reclassification hearing context, defendants cannot be held liable for their actions in connection with plaintiff's reclassification hearing;

17. That as a consequence of the disciplinary hearing plaintiff was sentenced to and served 15 days in isolation in MCI Concord;

18. That plaintiff was earning $1.00 per day at MCI Concord prior to being placed in isolation; and

19. That plaintiff was not paid while serving in isolation.

RECOMMENDATIONS OF LAW

1. Any of the foregoing

Findings of Fact which should more properly be considered recommendations of law.

2. Defendant Vinzant is liable to plaintiff for his [Vinzant's] actions in connection with plaintiff's appeal from the decision of the Disciplinary Board.

The defendants are entitled to a qualified immunity. Downs v. Sawtelle, No. 77-1260, Slip Op. (1st Cir. March 30, 1978). In Wood v. Strickland, 420 U.S. 308 (1975), the Supreme Court established a rule of qualified immunity for certain government officials. An official entitled to a qualified immunity will be liable for damages under §1983:

> if he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the consitutional rights of the [plaintiff], or if he took the

> action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]. . . . A compensatory award will be appropriate only if the [defendant] . . . acted with such an impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot be reasonably be characterized as being in good faith." id at 322.

Hence, in determining liability in this area at least two facts must be weighed: (1) Were the constitutional rights at issue clearly established at the time of the alleged violation, Morris v. Travisano, 528 F.2d 856, 858 n.5 (1st Cir. 1976), and, if so, (2) did the defendants act in bad faith.

A. Plaintiff's constitutional rights were clearly established at the time of the alleged violation.

The rights at issue were clearly established in two respects at the time of the violations. First, the minimal due process rights of prior written

notice and the presentation and cross-examination of witnesses were clearly recognized in the disciplinary hearing context at the time of the violations. See, Palmigiano v. Baxter, 487 F.2d 1280, 1283 n.7 (1st Cir. 1973). This fact was made plain by the District Court when it held that "plaintiff was deprived of rudimentary elements of fundamental fairness long recognized by the courts, and, in fact, the Massachusetts correctional authorities." Higgins, supra 370 F.Supp. at 1027. Second, the regulations promulgated by the Department of Corrections require that a defendant in a disciplinary proceeding receive the right to prior written notice, the right to present witnesses and the right to cross-examine the reporting officer. The violation of

this regulation "constitutes a violation of due process of law." Higgins at 1028.

B. Defendant Vinzant's action denying plaintiff's appeal constituted a reckless disregard of plaintiff's clearly established rights.

Plaintiff appealed the decision of the disciplinary board to the defendant Vinzant. In his appeal, plaintiff alleged that the institution was "playing games" and that the hearing was a "Kangaroo Court." (Ex. 2). While these allegations may not be artfully drawn and are doubtlessly not new to a corrections official, they do raise the issue of procedural impropriety. More important, a person who is a vital link in the administrative hearing chain has a responsibility to ensure that a defendant receives his clearly established constitutional and regulatory rights. See, Dimarzo v.

Cahill, supra, Slip Op. at 5-6. On this record, it is clear that defendant Vinzant made no effort, after receipt of defendant's appeal, to determine if defendant was afforded the constitutional and regulatory rights to which he was entitled. Defendant relied, in making his judgment, upon the report of the hearing board. The report said nothing about the procedural rights received by plaintiff; therefore, at least aafter plaintiff raised the issue of procedural impropriety, defendant Vinzant had a duty to determine if plaintiff had received his clearly established constitutional and regulatory rights of due process. He failed to do so. Under the circumstances of this case, I conclude that this failure constitutes a reckless disregard of the clearly established

rights of the plaintiff and renders defendant Vinzant liable to the plaintiff.

3. Defendant Higgins is not liable for his actions or inactions.

In Rizzo v. Goode, 423 U.S. 362, 371, 377 (1976) the Supreme Court indicated that before liability may be found there must be a sufficient link between the constitutional violations and the actions or inactions of the defendant. Plaintiff has failed to establish a sufficient link between the constitutional violations occurring in the disciplinary hearing process and the actions or inactions of defendant Higgins.

In this case the Department of Corrections had promulgated rules which comported with due process standards. In the absence of evidence to the

contrary, defendant Higgins could properly assume that these rules would be followed. No evidence was presented to establish that Higgins knew or should have known that the established departmental procedure was not being followed.

4. Neither Vinzant nor Higgins is liable to plaintiff for actions taken in regard to the reclassification hearing since the law was unclear at the time of the incident.

While the issue of due process in a prison disciplinary hearing was well established by the date of this incident, Palmigiano, supra 487 F.2d at 1283, n.7, the courts had not directly addressed this issue in he context of a reclassification hearing by this time and were seemingly then in agreement

that "a state prisoner has no constitutional right to remain in any particular prison." Gray, supra 465 F.2d at 187. To be sure, the court in Gomes, supra 353 F.Supp. at 467 held that minimal requirements of due process must be provided before a prisoner could be transferred to a prison out of state; however, the court did not suggest that minimal due process requirements must be met before a prisoner could be transferred to another prison within the state. Even assuming Gomes could be interpreted as requiring that a prisoner receive minimal due process before being transferred intrastate, the law in this area at the time of this incident was still unclear. See, Gray, supra 465 F.2d at 187. For this reason I conclude that the law at the time of this incident had not sufficiently

crystalized to justify a finding of liability on this issue.

5. In view of my findings of fact and recommendations of law with respect to the disciplinary and reclassification hearings, I conclude that it is unnecessary to comment upon the issue of the alleged deprivation of counsel.

6. Defendant Vinzant is liable to the plaintiff for compensatory damages in the amount of $390.00.

Claims for money damages against officials in their individual capacity are not barred by the eleventh amendment. Ex Parte Young, 209 U.S. 123 (1908); Scheuer v. Rhodes, 416 U.S. 232 (1974). Once an official has been found liable, as defendant Vinzant has in this case, the court may assess damages against him.

The damages available in civil rights actions include nominal damages or compensatory damages and/or punitive damages. The fifteen days which plaintiff spent in isolation as the result of an unconstitutional hearing establishes actual damages; therefore, nominal damages are inappropriate. Where actual damages are shown, compensatory damages should be awarded.

As the court stated in Magnett v. Pelletier, 488 F.2d 33, 35 (1st Cir. 1973),

> "If a compensable injury has been shown, compensatory damages must be given; if not, nominal damages should not be used to compensate plaintiff in any substantial manner, since he has shown no right to such compensation."

In awarding compensatory damages in the prison context, the court may consider any loss of wages, Landman v. Royster, 354 F.Supp. 1302, 1318 (E.D. Va. 1973),

as well as pain and suffering resulting from the violation. Vargas v. Corea, 416 F.Supp. 266, 272 (D.C. N.Y. 1976).

The evidence indicates that plaintiff's salary at the time of the incident was $1.00 per day. Findings of Fact, No. 18. As a result of the fifteen days spent in isolation, plaintiff suffered a wage loss of $15.00.

Being placed in isolation from the relatively less restricted life on Concord's farm resulted in a serious deprivation of plaintiff's liberty This deprivation amounts to compensable pain and suffering. United States Ex Rel. Neal v. Wolfe, 346 F.Supp. at 576. The determination of damages under these circumstances is at best difficult. $25.00 per day has been recognized as a reasonable award in cases in which prisoners have been unfairly placed in

isolation from a prison setting. Landman v. Royster, 354 F.Supp. 1302, 1318 (E.D. Va. 1973); United States Ex Rel. Neal v. Wolfe, 346 F.Supp. at 576. In the absence of other criteria for establishing a just amount, I recommend an additional award of $375.00 for pain and suffering resulting from plaintiff's being unlawfully placed in isolation.

Finally, punitive damages must be considered. In order for punitive damages to be awarded, an official's conduct must be "an outrageous invasion of plaintiff's privacy without color of right for an improper motive," Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir. 1968) or a malicious act in gross disregard of the plaintiff's rights. Magnett, supra 360 F.Supp. at 907.

While defendant's failure to ensure that plaintiff received the clearly

established constitutional and regulatory rights to which he was entitled amounts, in my judgment, to a reckless disregard of the plaintiff's rights, I cannot conclude on this record that defendant's conduct was so egregious as to warrant the imposition of punitive damages. For this does not appear to be a case where the defendant acted "out of malicious bad faith", Perez v. Rodriquez Bou, 77-1101 and 1102, Slip Op., p. 7 (1st Cir. May 5, 1978). Nor is this a case, apparently, in which the violation repeatedly occurred.

For these reasons I conclude that an award of punitive damages would be inappropriate in this case.

CONCLUSION

For all of the above reasons, I recommend that the court find the defendant Vinzant liable to the plaintiff for damages in the amount of $390.00 and that the court find that the plaintiff has failed to present sufficient evidence upon which to find defendant Higgins liable.

UNITED STATES MAGISTRATE

United States Court of Appeals
For the First Circuit

No. 74-1049

ARNIE KING,

PLAINTIFF, APPELLEE,

v.

JOSEPH HIGGINS, et al.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE and CAMPBELL, *Circuit Judges*

Dennis J. LaCroix, Deputy Assistant Attorney General, with whom *Robert H. Quinn*, Attorney General, and *John J. Irwin, Jr.*, Assistant Attorney General, Chief, Criminal Division, were on brief, for appellants.

Edward Berkin, with whom *Geraldine S. Hines* was on brief, for appellee.

April 24, 1974

PER CURIAM. This appeal challenges the district court decision ruling invalid the classification hearing provided appellee, an inmate of Massachusetts Correctional Institution at Concord.[1] The decision below was a dual one, the first part of the decision dealing with the claim that insufficient procedures were afforded in a disciplinary hearing at which the appellee was found to have committed

[1] The appellants also challenge the denial of summary judgment by the district court in a damage claim based on the same facts. As this matter has been referred to a magistrate and factual findings have not yet been made, it is not a final determination and is not appealable, 28 U.S.C. § 1291. This part of the appeal is dismissed.

infractions warranting imposition of a fifteen day period of isolation. The procedures in that hearing were found inadequate as a matter of law. The appellants do not attack that ruling. The second prong of the decision dealt with the challenge to the action of the classification board at a hearing held one day after the invalid disciplinary hearing. The board based reclassification, at least in part, on the disciplinary findings; the district court ruled that this procedure was also defective.

We are urged by appellee to affirm the decision below on broad constitutional grounds. We decline the invitation, noting that new regulations governing classification hearings are being developed. It is sufficient ground for relief in this case that the concededly invalid disciplinary hearing, held on the previous day, was to some uncertain extent taken into account in appellee's reclassification. We think that both fairness and common sense require a new classification hearing.

On this narrow basis the order of the district court is affirmed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX H

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ARNOLD L. KING,
Plaintiff

CIVIL ACTION
No. 73-2227-T

v.

JOSEPH HIGGINS and
DOUGLAS VINZANT,
Defendants

OPINION

January 30, 1974

This is a civil rights action (42 U.S.C. §1983, 1985) for injunctive, declaratory and monetary relief in which plaintiff, an inmate in M.C.I. Concord at the time in question, alleges deprivation of his rights to due process of law and effective assistance of counsel. Defendants are the then acting Commissioner of Corrections and Superintendent of M.C.I. Concord.

Pursuant to an Order of Reference, the matter was heard by the magistrate, who made findings of fact and recommended dismissal of the complaint. For the reasons outlined below, the court is unable to approve the magistrate's recommendation.

All parties have stipulated that "the case should be considered fully submitted and therefore ripe for a decision on the merits."

The magistrate made the following findings of fact, which stand uncontested by the parties.

Plaintiff is twenty years old. Following a judgment of conviction for murder in the first degree, he was sentenced on June 21, 1972 to M.C.I. Walpole to serve a life sentence. Plaintiff is not eligible for parole. He remained at Walpole until December

21, 1972 when he was transferred to M.C.I. Concord.

Prior to the incident giving rise to this complaint, disciplinary action was taken against plaintiff on several occasions at both Walpole and Concord, all on the basis of alleged disobedience.

At Concord, plaintiff was active in several rehabilitative projects, such as the tutor and teaching aid programs. He worked in the library where he was given a great deal of responsibility, and was a member and treasurer of the Inmate Council.

On June 14, 1973 plaintiff was transferred to the Farm Section of M.C.I. Concord, in which the inmates are housed in a dormitory-like facility some distance from the main institution. On July 2, 1973 plaintiff was late reporting to work on the Farm, and a

dispute developed between plaintiff and the officer in charge of the work detail. The officer in his report claimed that plaintiff walked off the field without permission and refused to return to work, and that he spoke to other inmates who also walked off the field. Plaintiff asserts that he merely sought a drink of water.

Plaintiff and the other inmates were immediately taken to the main institution and confined in "Awaiting Action cells. Plaintiff remained in the cell from 11:45 a.m. to 4:30 p.m. when he was taken before a disciplinary board consisting of two deputy superintendents and a social worker. A hearing was held in which plaintiff was charged with refusing to work, refusing a direct order, and inciting a riot. The report of the officer was read to plaintiff,

and the board asked for his version of the incident. Plaintiff denied the charges and claimed that all he wanted was a drink of water. After a discussion, the board decided that plaintiff was lying, and ordered him to serve fifteen days in isolation.

No member of this board advised plaintiff that he could seek the advice of counsel, confront the complaining officer, or present witnesses in his own behalf. Plaintiff made no requests to do so.

Following the hearing plaintiff was advised of his right to appeal and was provided with an appeal form which he completed. The form was forwarded to the Superintendent, who denied the appeal.

The other seven inmates involved appeared before the disciplinary board

and were similarly ordered to isolation.

The following day Robert Sarafian, Director of Treatment at Concord, was asked to hold a reclassification hearing on plaintiff and four other inmates. Chosen to sit on the board with Sarafian were James Veves, Assistant Deputy Superintendent, Robert Craig and Jerard Gagnon, both Correction Officers, and one unidentified member. Sarafian was the only member of the board not aware of the farm incident of the previous day.

Plaintiff was not given written notice prior to the hearing. Nor was he advised one way or the other with respect to any right to counsel he might have. He was informed, however, of his right to present testimony and evidence in his own behalf. Plaintiff was also asked to comment on evidence which the reclassification board had before it.

After the hearing, the board decided to recommend that plaintiff be transferred to M.C.I. Walpole. He was advised of this recommendation and of his right to appeal to the Superintendent or the Commissioner of Corrections. Plaintiff did not exercise his right of appeal.

The reason given by the reclassification board for recommending the transfer was the fact that plaintiff had been involved in frequent disciplinary infractions. While not so specifying in their reclassification hearing report, the members of the board testified before the magistrate that it was their belief that plaintiff was not suitable for Concord because its programs are designed for inmates who are placed there for only a short time. The average inmate at Concord is serving

an indeterminate sentence, and the average parole eligibility is from six to eighteen months. As pointed out above, plaintiff is not eligible for parole. Of the 401 inmates at Concord, ten or eleven are serving life sentences, two or three for first degree murder. All of the other inmates serving life sentences have been incarcerated at other institutuions and have served many years prior to being transferred to Concord.

The transfer of plaintiff was approved by the Commissioner on July 25, 1973 and he was removed to M.C.I. Walpole, where he is presently confined.

Plaintiff argues that the procedure of the disciplinary board, resulting in his isolation, and the procedure of the reclassification board, resulting in his transfer, were constitutionally

deficient under the Due Process Clause of the Fourteenth Amendment. Plaintiff also contends that he was deprived of his Sixth Amendment right to counsel while confined in isolation.[1] For the reasons outlined below, the court agrees with his first contention.

It is now settled in this Circuit that some due process is required before an inmate can be sentenced to segregation. Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973). Palmigiano was decided after the incident giving rise to plaintiff's complaint, and after the magistrate's recommendation. The Court of Appeals stated in its opinion that it would give only prospective enforcement of the "novel" requirements of use immunity and right to

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1/ This contention, the basis of plaintiff's original action, was not dealt with by the magistrate.

counsel.[2/] The standards violated in the instant case, however, are far from novel. On the contrary, plaintiff was deprived of rudimentary elements of fundamental fairness long recognized by the courts and, in fact, the Massachusetts correctional

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2/ "We therefore conclude that appellant was denied due process in the disciplinary hearing only insofar as he was not provided with use immunity for statements he might have made within the disciplinary hearing, and because he was denied access to retained counsel within the hearing. Since, however, this solution is novel, the appellee cannot in fairness be subject to a sanction which would ordinarily accompany the violation of preexisting law, Jones v. Rundle, 358 F.Supp. 939 (E.D. Pa. 1973); cf. Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U.S. 358 (1932). It follows that appellant's claim for money damages must be denied. However, appellant's in-prison record will be expunged of all findings and decisions pertaining to the alleged infraction and the disciplinary board hearing. We will apply this rule in the future only to those cases where a disciplinary hearing occurs subsequent to the date of this opinion." Palmigiano, 487 F.2d at 1292.

authorities.[3/] It is unnecessary, therefore, to rely on Palmigiano in resolving the issues presented in the instant case.

The conclusion in Palmigiano that:

> a minimal level of due process must be achieved in reaching any decision concerning a particular inmate which may result in a marked change in the status of the inmate's confinement, with he result that he has come to rely.

Palmigiano, 487 F.2d at 1284, was a reaffirmation of the position of the Court of Appeals in 1970, when it held that:

> [w]hile all the procedural safeguards provided citizens charged with a crime obviously cannot and need not be provided to prison inmates charged with violation of a prison disciplinary rule, some assurances of elemental fairness are essential when substantial individual interests are at stake.

Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970).

3/ See disucussion of departmental regualtions below.

The decision to order plaintiff from the minumal security of the prison farm[4/] to segregation, with the attendant possibility of reclassification and future re-punishment,[5/] is clearly one that markedly changed his status of confinement and constituted a grievous loss. Plaintiff was entitled, therefore, to due process safeguards. Many courts have so held prior to the recent decision in Palmigiano v. Baxter, supra. See McDonnell v. Wolff, 483 F.2d 1059 (8th Cir. 1973), cert. granted, ____ U.S. ____, 94 S.Ct. 913, 39 L.Ed. 108 (1974); Sostre v. McGinnis,

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4/ Douglas Vinzant, Superintendent of M.C.I. Concord at the time in question, described the farm as a type of work-release program. See Transcript of Hearing before Magistrate, I, 86-87.

5/ See Gomes v. Travisono, 490 F.2d 1209, 1213 (1st Cir. 1973).

442 F.2d 178 (2nd Cir. 1971), cert. denied sub. nom. Sostre v. Oswald, 404 U.S. 1049; Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973); Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973); United States ex rel. Neal v. Wolfe, 346 F. Supp. 569 (E.D. Pa. 1972); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971) Urbano v. McCorkle, 334 F. Supp. 161 (D.N.J. 1971), affm'd 481 F.2d 1400; Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Sinclair v. Henderson, 331 F. Supp. 1123 (E.D. La. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Bundy v. Cannon, 328 F. Supp. 165 (D. Md. 1971). See also Order dated June 29, 1973 in Danese v. Moriarty, 73-504-T (D. Mass.), note 7, infra.

The issue becomes, therefore, not whether but how much plaintiff was

entitled to by way of due process at his disciplinary hearing. This question has been answerd by the Court of Appeals in its Palmigiano v. Baxter opinion.[6/]

6/ The Morris rules, [Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970)], adopted as a basic standard by the First Circuit in Palmigiano v. Baxter, require: 1. timely notice of the charges against the inmate; 2. an opportunity to appear at the disciplinary hearing with the assistance of an authorized counsel-substitute; 3. an impartial tribunal, none of whose members reported upon or witnessed the alleged infraction; 4. the right to call witnesses and cross-examine them; 5. the right to a decision based upon "substantial evidence"; 6. notice of the rationale and consequences of the decision; and 7. the opportunity to appeal the decision to the Superintendent.

The First Circuit has added three more constitutional requirements for disciplinary board hearings: 1. "use" immunity for statements the inmate might make at the disciplinary hearing and a requirement that the inmate be informed at the hearing of his immunity and its consequences; 2. permission for the inmate to bring retained counsel with him to the disciplinary hearing if he so

(footnote continued)

But this court need not rely upon these recently enuciated requirements, because measured against even the most basic standards of due process and fundamental fairness, the disciplinary procedure afforded plaintiff fails to pass constitutional muster.

Plaintiff was not afforded timely notice of the charges against him. They were read to him only after the disciplinary hearing had begun. Advance written notice is a critical element in "rudimentary due process." Goldberg v. Kelly, 397 U.S. 254, 267 (1970); Sarzen

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(footnote continued)

desires; 3. an admonition "that in instances where the identity of an adverse witness is withheld from an accused inmate, out of a legitimate fear that otherwise the witness would be subject to retributive violence, the board has a strong obligation to summon the adverse witness before it, in camera, and probe the credibility of the witness." Palmigiano v. Baxter, supra

v. Gaughan, 489 F.2d 1076, 1084 (1st Cir. 1973). For an exhaustive compilation of cases applying this concept to prison desciplinary procedures, see Sands v. Wainwright, 357 F. Supp. 1062, 1085-86 (M.D. Fla. 1973). See also Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973); Order dated June 29, 1973 in Danese v. Moriarty, 73-504-T (D. Mass.), note 7, infra.

It is no answer to the failure to provide notice prior to the hearing that "King knew why he had been placed in the 'Awaiting Action' cell." Magistrate's Memorandum, p. 6. It would be fundamentally unfair to presume that an inmate would "know" he would be charged with inciting a riot because he walked off a field. While the prisoner may be charged with knowledge of facts and circumstances of a particular event, he

cannot be charged with knowledge as to the legal interpretation or theory of action which prison authorities may seek to follow with repect to such event. The situation is analogous to that involving an individual who knows the circumstances which brought about his arrest, but is nonetheless entitled to notice as to the theory of action the government intends to pursue with repsect to his case.

Plaintiff was not told that he had the right to call witnesses in his behalf, or to require the presence of the officer upon whose report the board soley relied. He was merely permitted to state his version of the alleged offenses set out in the written report. The opportunities to present evidence and to confront adverse witnesses are safeguards basic to event the most

conservative view of fundamental fairness. See Goldberg v. Kelly, 397 U.S. 254, 267-70 (1970). For an exhaustive compilation of cases applying this concept to prison desciplinary hearings, see Sands v. Wainwright, 357 F. Supp. 1062, 1086-88 (M.D. Fla. 1973). See also Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973); Order dated June 29, 1973 in Danese v. Moriarty, 73-504-T (D. Mass.), note 7, infra.

These departures from traditional norms of fundamental fairness would in themselves require the granting of relief by this court. Beyond this, however, is the fact that the defendants failed to follow their own departmental regulations for the conduct of disciplinary hearings. See Commissioner's Bulletin 72-1. These rules, in effect since June 5, 1972,

require that an inmate charged with a major infraction be given: written notice of the charges and a copy of the disciplinary report prior to the hearing; the opportunity to be represented by counsel or a law student; and the opportunity to have the complaining officer present and to question him. The failure to adhere to these general guidelines promulgated to insure "a speedy and fair adjudication of alleged wrong-doing", see Commissioner's Bulletin 72-1, itself constitutes a violation of due process of law. See United States v. Leahey, 434 F.2d 7 (1st Cir. 1970); Carter v. McGinnis,, 320 F. Supp. 1092 (W.D.N.Y. 1970).

Lastly, defendants were on notice as of June 29, 1973, see Order entered in

Danese v. Moriarty,[7/] that this court required the basic due process safeguards of notice and confrontation, among others, before inmates could be confined in segregation.

Because the procedures employed by

7/ By Order dated June 29, 1973 in Danese v. Moriarty, 73-504-T, this court set down the following requirements for hearings to be given to plaintiff-inmates at Walpole confined in segregation:

1. Prior written notice of the charges;
2. Opportunity to have the assistance of counsel or a lay advocate in preparation for and during the hearing;
3. A hearing before an impartial tribunal;
4. Opportunity to testify, call witnesses, present evidence, and cross-examine persons giving testimony in support of the charges;
5. Opportunity to record the proceedings by tape recorder or other like device, such recordings to be made a part of the inmate's institutional record;
6. A decision based on reliable and substantial evidence;
7. Written findings of fact upon which the determination of the decison is based.

defendants fall "so short of the fairness and respect for elementary rights which is at the heart of due process," see Sarzen v. Gaughan, 489 F.2d 1076, 1083 (1st Cir. 1973), the decision of the disciplinary board must be invalidated and plaintiff's prison record expunged of all findings and conclusions by that board. Such expungement is required because a prisoner's "disciplinary record may follow him throughout the prison system; if his punishment was without cause, he is punished a new each time his record is used against him. Burgett v. Texas, 389 U.S. 109 (1967)." Gomes v. Travisiono, 490 F.2d 1209, 1213 n.6 (1st Cir. 1973).

The findings and conclusions of the reclassification hearing, convened and conducted at least in part on the basis of the tainted disciplinary hearing,

must similarly be invalidated and expunged from plaintiff's record.

Further, the decision to transfer plaintiff from the relative freedom of the prison farm at M.C.I. Concord to the maximum security of M.C.I. Walpole was one which markedly changed the status of his confinement as well as his access to ancillary amenities. See Palmigiano v. Baxter, supra, 487 F.2d at 1284; Nolan v. Scafati, 430 F.2d 548, 550 (1st Cir. 1970). Plaintiff was entitled to at least a minimal level of due process by authorities making such a decision. "[S]ome due process is mandated in all transfer cases." Gomes v. Travisono, supra, 490 F.2d at 1214.8/

8/ While Judge Campbell's concurring opinion was limited to out-of-state transfers, see also Slip op. p. 6, n. 8, the Court's decision was based on the "serious deprivation" analysis of

(footnote continued)

Plaintiff was entitled to such due process whether the decision affecting his status was based on security, rehabilitation or punishment. Palmigiano v. Baxter, supra, 487 F.2d at 1284; Gomes v. Travisono, supra.

The minimal requirements for insuring the integrity of the decision-making process are that the inmate be given prior notice of the contemplated transfer and the reasons therefor, as well as a hearing which provides him with a reasonable opportunity to meet the charges against

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Palmigiano v. Baxter. As such, Gomes would seem to require that some due process attend a decision to transfer from a minimal security prison farm at Concord to the maximum security of Walpole. Moreover, the Court required the increased safeguards of the Morris rules for transfers, like plaintiff's, which are based on the inmate's past conduct. Gomes, 490 F.2d at 1215.

him. Gomes v. Travisono, supra, 490 F.2d at 1215. "When a prisoner knows what is happening he can take steps, even before the appointment of counsel becomes constitutionally mandated, to protest obvious errors and to secure the assistance of private cousel, family or friends." Sarzen v. Gaughan, 489 F.2d 1076, 1084 (1st Cir. 1974). Defendants failed to afford plaintiff even these minimal protections, for he was not given notice of the proposed transfer or reasons therefor prior to the hearing.

While the Court of Appeals has carved out an exception to its due process requirements in emergency situations, see Gomes, 490 F.2d at 1215, see also, O'Brien v. Moriarty, F.2d (1st Cir. Jan. 9, 1974), there is no evidence before this court to warrant a finding of extreme unrest at the time of

plaintiff's transfer. Moreover, even in emergencies, "[d]ue process requires, however, that once the transfer takes place, the inmate be granted at the earliest opportunity the minimal [due process] procedures...." Gomes, 490 F.2d 1215.

The inmate is not the sole beneficiary of these constitutional guarantees. The public itself has a vital interest and stake in the rehabilitation of prisoners. As a practical matter, rehabilitation is nothing more than a determination by a prisoner to live within our system of law and order. While confined, his only exposure to such a system is that supervised by prison officials. The chances of rehabilitation improve markedly when prisoners become aware and convinced that the system is fair and

that it works. Absent such awareness and convicition, the prospects for rehabilitation are painfully obvious.

Plaintiff has requested injunctive relief restraining defendants in futuro from confining him in segregation or transferring him again without affording him his procedural due process rights. The court concludes, however, that the recent decisions of the Court of Appeals in Palmigiano and Gomes, establishing explicit due process rules for these prison situations, make such relief unnecessary at this time.

Plaintiff's claim for compensatory and punitive damages for violation of his constitutional rights will be referred to the magistrate for findings and recommendations.

The Court orders that the findings and conclusions of the disciplinary

board and reclassification board be invalidated and expunged from plaintiff's prison record; and that he be provided with hearings (disciplinary and reclassification) to be conducted in a manner consistent with the provisions of this opinion.[9/]

9/ The magistrate made no findings of fact with respect to plaintiff's allegation that defendant Vinzant prevented counsel from speaking with the plaintiff for a number of days when he was confined in isolation. In view of the Court's order, it is unnecessary to resolve the issue raised by such an allegation. For present purposes it is sufficient to note that prisoners retain their constitutional right to effective assistance of counsel, and the corollary right to free and private communication with counsel. Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Smith v. Robbins, 328 F. Supp. 162 (D. ME. 1971) (see cases cited at 164), modified in part Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972); Palmigiano v. Travisono, 317 F.Supp. 776, 789 (D.R.I. 1970). Any interference with such a basic right bears a heavy burden of justification. Massachusetts has recognized the sanctity of such a principle as a matter

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United States District Judge

(footnote continued)

of state policy in Mass. Gen. :Laws Ann. Ch. 127 Sec. 36A (1958):

> The superintendent shall not abridge the right of an inmate of any correctional or penal institution in the Commonwealth to confer with any attorney at law engaged or designated by him, and such attorney may visit such inmate at such times as may be established under rules promulgated by the commissioner.